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No. 83-

In The

Supreme Court of the United States

October Term, 1983

DENNIS LYNCH, Individually And As Mayor Of The City of Pawtucket, RICHARD A. MUMFORD, Individually And As Finance Director For The City of Pawtucket, And GUY DUFAULT, Individually And As Director Of Department Of Parks And Recreation Of The City Of Pawtucket, And The CITY OF PAWTUCKET,

Petitioners,

v.

DANIEL DONNELLY, GEORGE DRIEBEL, ROBERT GOODWIN, GREG FRAZIER And AMERICAN CIVIL LIBERTIES UNION, RHODE ISLAND AFFILIATE,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

Does a municipality's ownership, erection, and display of a nativity scene depicting the Biblical story of the birth of Jesus Christ violate the Establishment Clause of the First Amend-

ment to the United States Constitution, made applicable to the States by the Fourteenth Amendment?

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STATEMENT OF THE CASE

The City of Pawtucket, Rhode Island, together with several governmental officials, seek here a review of the decision of the United States Court of Appeals for the First Circuit, which held that the City of Pawtucket, by its ownership and erection of a Nativity Scene depicting the Biblical account of the birth of Jesus Christ, has violated the First and Fourteenth Amendments of the United States Constitution.

F.2d (1st Cir., 1982). The Court upheld the decision of the United States District Court for the District of Rhode Island, in its findings that the creche maintains a fundamental religious significance, that the municipal defendants, petitioners here, were unable to advance any legitimate secular purpose for the inclusion of the creche in its Christmas display, and that the City's erection of the creche has primary effect of advancing religion.

The City of Pawtucket has annually erected a Christmas display in an urban park area owned by a private historical association and located in downtown Pawtucket, approximately three hundred feet from the Pawtucket City Hall. The City purchased the life-sized creche in 1973, and erects it in the center of the westerly portion of the park, where it is directly across and clearly visible from the adjacent streets and the bus stop located thereon. Twelve spotlights and numerous smaller lights, financed by the City, illuminate the entire display; two of those spotlights are trained directly upon the Nativity Scene.

In 1980, in addition to the annual lighting ceremony, the Mayor of the City, a petitioner here, held a press conference next to the creche. During that press conference he led public school children in caroling, and he vowed to fight the ACLU's attempt to "take Christ out of Christmas." Indeed, the testimony of plaintiffs and their experts in religious and in symbolism, as well as the public's response to the Mayor's support of the creche, demonstrate that many identify the City's position as one of support for the Christian tradition and the religious beliefs of the majority of the community.

The Mayor, on the other hand, testified that the creche was an incidental part of the Christmas display, and that the purpose of the display would continue to be met even if the Nativity Scene were removed. Two local businessmen who testified for the City agreed.

The United States District Court concluded from the evidence before it that the creche continues to represent a religious statement, and that the City's ownership, erection, and display of the creche violates each aspect of the tripartite test set forth in Lemon v. Kurtzman, 403 U.S. 602 (1971). In its review of the trial court's decision, the United States Court of Appeals for the First Circuit applied a test of strict scrutiny of governmental action which is preferential in the treatment of one religion over another. Larson v. Valente, ____ U.S. ____, 102 S.Ct. 1673 (1982). Although the Court's approach reflected the intervening decision in Larson, supra, it also specifically upheld the trial court's determination that the

creche is indeed a religious symbol, and that the City's actions violated both the secular purpose test and the primary effect test set forth in Lemon, supra.

ARGUMENT

Petitioners, the City of Pawtucket and its officials, couch the questions which they present so as to seek review of the constitutionality of an entire Christmas display, as opposed to the municipal ownership and erection of a Nativity Scene. Further, they seek a determination of the constitutionality of including any religious symbolism within all publicly sponsored Christmas displays. Petitioners' questions as presented both misconstrue and far exceed the scope of the decision of the United States Court of Appeals for the First Circuit, from which review is sought. Respondents respectfully suggest that the proper characterization and scope of the review sought before this Honorable Court is merely this:

> Did the lower courts correctly determine that a municipality's ownership, erection and display of a Nativity Scene depicting the the Biblical story of the birth of Jesus Christ violates the Establishment Clause of the First Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment?

Respondents urge that the United States Court of Appeals' decision in this matter is not in conflict with any reported decisions of other United States Courts of Appeals, and is in complete accord with the relevant decisions of the United States Supreme Court.

No new legal issue is presented here; rather, the United States Court of Appeals has properly applied existing case law to the particular factual situation before it. Finally, if the United States Court of Appeals' decision conflicts in any way with previous decisions of other state courts of last resort, then a consideration of the age of the state court decisions upon which petitioners rely, and a reading of those decisions in light of subsequent decisions of the United States Supreme Court and other United States Courts of Appeals, amply demonstrate that the decision of the lower court in this case more accurately reflects current case law pertaining to the Establishment Clause of the United States Constitution.

The municipal petitioners argue first that the manner in which the City presented the Nativity Scene is neutral by its nature, having no purpose or effect beyond that of the entire Christmas display. Petition for Certiorari, at 8. They maintain that the courts below should properly have applied the tripartite test set forth in Lemon v. Kurtzman, 403 U.S. 602 (1971), to the City's entire Christmas display, rather than to the creche alone. Petition for Certirari, at 12. By so arguing, Petitioners ignore the findings of fact made by the trial court and upheld by the United States Court of Appeals, and seek instead to bury the religious nature of the creche behind the facade of secular Christmas symbols. Furthermore, it is simply not true, as petitioners suggest, that "on the record in this case the creche has no purpose or effect at all apart from its surroundings." Id. at 8. Substantial testimony presented to the District Court

demonstrates that even in the setting of Hodgson Park, surrounded by secular Christmas symbols, the creche retains its religious significance. Contrary to petitioners' assertions, the findings of the United States Court of Appeals for the District of Columbia in the case of Allen v. Morton, 495 F.2d 65 (D.C. Cir. 1973) is in accord:

> The Pageant...is not subsumed in a religious mission, but it cannot be ignored that the religious symbol [the creche] contained in the Pageant can have a religious effect, and the degree of this effect can vary according to how it is utilized. In turn, the effect of the Government involvement therewith can vary according to the restrictions and controls placed thereon. A balancing of all these factors determine if the effect of the Government involvement is more than remotely or incidentally beneficial to religious institution.
>
> The creche as used in the Pageant is not supposed to have a sectarian effect in the sense of advancing any religious belief. The reality of the situation - considering its status as a Christian religious symbol - leaves open for debate whether its use is susceptible to misinterpretation, and the Government involvement looked upon as an imprimatur of the belief that it symbolizes.

Id. at 72-73, n. 13.

In addition , it should be noted that the factual circumstances in Allen, supra, differed from those present in this case. The City of Pawtucket is not here participating in a private event which includes among many displays a Nativity Scene. Rather, the City is erecting the creche within its own municipal display.

Applying the traditional tests set forth in Lemon, supra, both the District Court and the United States Court of Appeals found that the City's purpose in erecting the creche was "to endorse and promulgate religious beliefs," and that the erection of the creche "had the primary effect of advancing religion." Petition for Certiorari, at 8-12. The record reflects that the creche contributed nothing to the commercial purposes of the display, nor did the City disclaim any endorsement of the religious message nor include in the display any of the customs or traditions of other religions. Id. at A-8. Ample evidence also demonstrates that the actions of the City and its agents created an "aura of governmental approval" which had the effect of advancing the Christian religion. Id. at A-69. It cannot be disputed that such non-monetary support can constitute a substantial advancement of religion. Stone v. Graham, 449 U.S. 39 (1980); Grendel's Den, Inc. v. Goodwin, 662 F.2d 102 (1st Cir. 1981).

The City's reliance on Florey v. Sioux Falls School District, 619 F.2d 1311 (8th Cir.), cert. den. 449 U.S. 987 (1980), is not well founded, where the Court's conclusions in that case rested on clearly distinguishable factual circumstances. In Florey, the Court clearly stated that

its decision pertained only to the facial validity of rules regulating the observance of holidays in the schools. It did not purport to encompass the implementation of those rules. Id. at 1313. Since the evidence established that the purpose of the rules was to "insure that no religious exercise was a part of officially sanctioned school activities," the Court found that the rules had a valid secular purpose. Id. at 1314. Petitioners' reliance upon O'Hair v. Clements, 638 F.2d 1231 (1981), cert. den. 454 U.S. 878 (1981) is likewise unpersuasive, for as an unpublished opinion it has little precedential value.

Petitioners' argument that the United States Court of Appeals' decision in this case is in conflict with the decisions of other state courts of last resort is also illusory. The Supreme Court of Oklahoma's decision in Meyer v. Oklahoma City, 496 P.2d 789 (Oklahoma, 1972), cert. den. 409 U.S. 980 (1972) relies solely upon the Oklahoma Constitution which differs substantially from the Establishment Clause of the First Amendment of the United States Constitution. The Supreme Court of Oregon's decision in Eugene Sand and Gravel, Inc. v. City of Eugene, 558 P.2d 338 (Oregon, 1976), cert. den. 434 U.S. 876 (1977) also differs factually from the instant case in that that court had previously held the City of Eugene had violated the United States Constitution by authorizing the erection by private parties of a cross on public property. Lowe v. City of Eugene, 451 P.2d 117, 459 P.2d 222, 463 P.2d 360 (1969), cert. den. 397 U.S. 1042 (1970). In response to the court's decision in that case, the sponsorship, purpose and cere-

monies surrounding the cross were altered, and a plaque stating the cross's dedication as a Veterans' war memorial was erected. Finally, the decision in Paul v. Dade County, 202 So.2d 833, cert. den. 207 So.2d 690 (Fla. 1967), cert. den. 390 U.S. 1041 (1968), is not a decision rendered by a state court of last resort.

Petitioners also assert that review by certiorari should be granted in order to clarify this Court's decision in Larson v. Valente, U.S. , 102 S. Ct. 1673 (1982). Review for this reason is unwarranted, for the United States Court of Appeals specifically held that the City's actions in this case violated both the purpose and effect tests set forth in Lemon, supra; therefore, even if the Court of Appeals' reliance on Larson was misplaced, its decision would remain, unless this Court also disagreed with its application and interpretation of Lemon v. Kurtzman.

Finally, to the extent that Anderson v. Salt Lake City Corporation, 475 F.2d 29 (10th Cir. 1973) is in conflict with the lower court's decisions in this case, respondents respectfully suggest that the precedential value of Anderson has been severely restricted by this Court's recent decision in Stone v. Graham, supra.

CONCLUSION

For the reasons set forth herein, respondents respectfully request that the Petition for Certiorari be denied.

Respectfully submitted,

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